

APPEAL NO. 040189
FILED MARCH 17, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 4, 2003. Both the appellant (subclaimant) and respondent 1 (claimant) failed to appear at the CCH. The record reflects that a letter was sent to the claimant and the subclaimant, giving both 10 days from receipt to request that the hearing be reconvened to allow the claimant and subclaimant to show cause for their absence and to present evidence on the issues. After receiving no response from either the claimant or the subclaimant the record was closed on December 19, 2003. The hearing officer resolved the disputed issues by deciding that the claimed injury did occur while the claimant was in a state of intoxication and that the claimant did not sustain a compensable injury on _____. The subclaimant appealed, arguing that respondent 2 (carrier) cannot refuse payment for its services because it failed to timely dispute the claim. The appeal file does not contain a response from either the claimant or the carrier.

DECISION

Affirmed.

The subclaimant contends that the carrier did not timely dispute the claimed injury and cannot now refuse payment. Section 410.151 pertains to the scope of a CCH and subsection (b) provides that an issue that was not raised at a benefit review conference (BRC) may not be considered unless the parties consent or the Texas Workers' Compensation Commission determines that good cause existed for not raising the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) provides procedures for submitting an additional dispute by unanimous consent of the parties and for requesting the hearing officer to include an additional dispute upon a finding of good cause. The CCH record reflects that an issue regarding whether the carrier timely contested the claimed injury was not an issue at the BRC, was not a disputed issue at the CCH, and no request to add such an issue was made to the hearing officer. Since the carrier waiver issue was raised for the first time on appeal, the Appeals Panel will not consider that issue. Texas Workers' Compensation Commission Appeal No. 001189, decided July 3, 2000.

To the extent the subclaimant's appeal may be construed as appealing the determinations of intoxication and injury, we note that Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if an injury occurred while the employee was in a state of intoxication. Section 401.013(a)(2)(B), the intoxication provision applicable in this case, defines intoxication as not having normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue, as defined by Section 481.002 of the Texas Health and Safety Code. An employee is presumed sober. Texas

Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury, that is that he or she had the normal use of his or her faculties at the time of the injury. In this instance, the hearing officer properly determined that the positive drug screen was sufficient to shift the burden to the claimant to prove that he had the normal use of his mental or physical faculties at the time of the claimed injury. No evidence was presented at the CCH to show that the claimant had normal use of his mental or physical faculties at the time of the claimed injury. There was sufficient evidence to support the determinations of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **DALLAS FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CHARLES DAVID WOOD
14160 DALLAS PARKWAY, SUITE 500
DALLAS, TEXAS 75254.**

Margaret L. Turner
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge